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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1182

In the Matter of

SYLVIN S. PERRY,

Bankrupt.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CURTIS B. DANNING,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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vs.

CURTIS B. DANNING,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Franchise Tax Board of the State of California, hereinafter referred to as the Franchise Tax Board, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in Franchise Tax Board v. Danning on November 2, 1973, case number 71-1675.

Opinions Below

The opinion of the Court of Appeals is as yet unreported and is attached hereto as Appendix A. The opinion of the Court on denial of rehearing is attached hereto as Appendix B. There was no opinion rendered by the District Court, which was reviewing a decision

by a referee of the bankruptcy court. The latter is attached as Appendix C.

Jurisdiction

The opinion of the United States Court of Appeals for the Ninth Circuit in *Franchise Tax Board v. Danning* issued on June 8, 1973. A motion for rehearing was denied on November 2, 1973. Jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1254(1) and the writ is requested pursuant to Supreme Court Rule 19 1(b) because the Ninth Circuit Court of Appeals "has decided an important state . . . question in a way in conflict with applicable state law." Petitioner asserted below and asserts here that the State of California enacted a personal income tax lien which is valid upon recordation against both real and personal property and that said lien is perfected against bona fide purchasers once the lien is filed with the appropriate agency of the state, either a County Recorder or the Secretary of State. The Ninth Circuit Court of Appeals held that, indeed, the statute authorizing the lien validated it against both real and personal property, but that said lien was not perfected or enforceable insofar as it applies to personal property against bona fide purchasers because seizure was necessary to perfect the lien. It was thus applying Bankruptcy Act section 67 (c)(1)(B); 11 U.S.C. section 107(c)(1)(B) to invalidate the lien against the trustee in bankruptcy. This determination wholly contravenes state law. In arriving at this conclusion the Court of Appeals refused to interpret the state statutes in accordance with decisional and statutory law of the State of California which compelled a contrary result. The court also failed to apply the holding of *Wright v. Standard Engineering Corp.*,

28 Cal. App. 3d 244, 104 Cal. Rptr. 539 (1972), which dealt specifically with the nature and effect of a duly filed state tax lien against personal property.

On rehearing, it was urged that since the Court of Appeals had held that the lien in question had to be perfected by seizure, Bankruptcy Act section 67(c)(1)(B); 11 U.S.C. 107(c)(1)(B), the section which authorized invalidation of the lien, also provided that it could be rehabilitated against the trustee because it was subject to perfection by seizure. In response to this the Court made three specific determinations. The first was that the lien in question was not valid against a subsequent judgment creditor. (*See* Bankruptcy Act §§ 67(c)(1)(B) and 70(c); 11 U.S.C. §§ 107(c)(1)(B) and 110(c).) In so holding the Court refused to apply the holding of the California Court of Appeal in *Wright, supra* at page 250, which specifically states that a duly filed state tax lien is valid against a subsequent judgment creditor. The Court also stated that seizure was not necessary to perfect the lien, despite its specific holding to the contrary in the initial opinion. The Court also rejected the contention that the Proof of Claim filed by the Franchise Tax Board was sufficient notice under Bankruptcy Act section 67(c)(1)(B); 11 U.S.C. section 107(c)(1)(B). The Court gave no guidance as to what was proper notice; it said only that the notice filed by the Franchise Tax Board was not the notice contemplated by the Bankruptcy Act.

While the first opinion of the Court of Appeals was in error in failing to apply state law in judging a state statute, the import of the decision was clear. However, the decision on rehearing not only represents a turn around of the original opinion, it applies a rule diametrically opposed to a state case directly in point.

It failed to provide any guidance to the Franchise Tax Board, or any other claimant who might qualify under the proviso of Bankruptcy Act section 67(c)(1)(B); 11 U.S.C. section 107(c)(1)(B), as to what that section means. The Court's withdrawal from the earlier opinion made it impossible to discern the status of the state's lien, insofar as federal bankruptcy law is concerned. If, as the Court held on rehearing, the lien of the Franchise Tax Board is merely enforced by seizure, then it must follow that the lien has been perfected prior to that time. The only possible time would be when the lien is filed. If that is the case, the lien is valid under section 67(c)(1)(B); 11 U.S.C. section 107(c)(1)(B). At the current time, there are approximately $100,000,000 of Franchise Tax Board liens outstanding against personal property. The holdings of the Court of Appeals would destroy the efficacy of all liens against personal property in all but the most remote instances.

The Franchise Tax Board is unable to make sense out of the end result of the Court of Appeals' action, and the confusion created by and lack of guidance contained in those opinions merits issuance of the writ.

Questions Presented

1. Is the California personal income tax lien valid against the trustee in bankruptcy within the meaning of Bankruptcy Act section 67(c)(1)(B); 11 U.S.C. section 107(c)(1)(B)? Despite statute and case law sustaining the validity of the lien against a bona fide purchaser (in whose shoes the trustee stands for purposes of Bankruptcy Act section 67(c)(1)(B)), is there any basis for the Court of Appeals' holding that Bankruptcy Act section 67(c)(1)(B) renders invalid against the

trustee the state tax lien created by California Revenue and Taxation Code sections 18881 and 18882 which provide for a valid, existing duly noticed tax lien against both real and personal property.

2. Even if the lien created by California Revenue and Taxation Code sections 18881 and 18882 is not perfected or enforceable against the trustee as the Court of Appeals determined in its initial opinion, does not the second proviso of Bankruptcy Act section 67 (c)(1)(B); 11 U.S.C. section 107(c)(1)(B) sustain the validity of the lien.

Statutory Provisions Involved

1. This case involves the interpretation of California Revenue and Taxation Code section 18881.

> "If any tax, interest, or penalty imposed under this part is not paid when due, the Franchise Tax Board may file in the office of any county recorder a certificate specifying the amount of the tax, interest, and penalty due, the name and last known address of the taxpayer liable for the amount, and the fact that the Franchise Tax Board has complied with all provisions of this part in the computation and levy of the tax."

And section 18882:

> "From the time of the filing for recording the amount of the tax, interest, and penalty set forth constitutes a lien upon all property of the taxpayer in the county, owned by him or afterward and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and continues for 10 years from the date of the recording unless sooner released or otherwise discharged."

2. Also involved, peripherally are the California statutes set forth below, as they exist in their present form.

Revenue and Taxation Code section 18882.5:

> "The Franchise Tax Board may also file a certificate of state tax lien with the Secretary of State pursuant to Chapter 14.5 (commencing with Section 7220) of Division 7 of Title 1 of the Government Code. From the time of the filing of the certificate with the Secretary of State, the amount required to be paid, together with interest and penalty constitutes a lien upon all personal property in the state owned by the person or afterwards acquired by him until the certificate of state tax lien lapses. The lien has the force, effect and priority of a judgment lien. A lien imposed by this section shall not be valid, insofar as a beneficial interest under a mortgage or deed of trust is concerned, as against a purchaser of such interest for value without actual knowledge of the lien."

Revenue and Taxation Code section 6757:

> "If any amount required to be paid to the state under this part is not paid when due, the board may within three years after the amount is due file for record in the office of any county recorder a certificate specifying the amount, interest, and penalty due, the name and address as it appears on the records of the board of the person liable for the same, and the fact that the board has complied with all provisions of this part in the determination of the amount required to be paid. From the time of the filing for record, the amount required to be paid together with interest and pen-

alty constitutes a lien upon all property in the county owned by the person or afterward and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and shall continue for 10 years from the time of the filing of the certificate unless sooner released or otherwise discharged. The lien may, within 10 years from the date of the filing of the certificate or within 10 years from the date of the last extension of the lien in the manner herein provided, be extended by filing for record a new certificate in the office of the county recorder of any county and from the time of such filing the lien shall be extended to the property in such county for 10 years unless sooner released or otherwise discharged. The lien imposed by this section shall not be valid insofar as personal property is concerned as against a purchaser for value without actual knowledge of the lien."

Revenue and Taxation Code section 6757.5:

"Within the time allowed in Section 6757, the board may also file a certificate of state tax lien with the Secretary of State pursuant to Chapter 14.5 (commencing with Section 7220) of Division 7 of Title 1 of the Government Code. From the time of the filing of the certificate with the Secretary of State, the amount required to be paid, together with interest and penalty, constitutes a lien upon all personal property in the state owned by the person or afterwards acquired by him until the certificate of state tax lien lapses. The lien has the force, effect and priority of a judgment lien. A lien imposed by this section shall not be valid * * * as against a purchaser for value without actual knowledge of the lien."

Unemployment Insurance Code section 1703:

"If an employing unit is delinquent in a payment of any contributions, penalties or interest provided for in this division, the director may, not later than three years after the payment became delinquent, or within 10 years after the last entry of a judgment under Section 1815, file for record in the office of any county recorder a certificate specifying the amount of contributions, interest and penalties due the cost of recording a release as specified in subdivision (b) of Section 6103.8 of the Government Code, the name and address as it appears on the records of the department of the employing unit liable for the same and the fact that the department has complied with all provisions of this division in the determination of the amount required to be paid. From the time of the filing for record, the amount required to be paid, together with interest, penalty, and the cost of recording the release, constitutes a lien upon all the property in the county owned by the person or acquired by him before the lien expires. The lien has the force, effect, and priority of a judgment lien and shall continue for 10 years from the time of the filing of the certificate unless sooner released or otherwise discharged. The lien may, within 10 years from the date of the filing of the certificate or within 10 years from the date of the last extension of the lien, be extended by filing for record a new certificate in the office of the county recorder of any county and from the time of such filing the lien shall be extended to all the property in such county for 10 years unless sooner released or otherwise discharged. A lien imposed by this section

shall not be valid insofar as personal property is concerned as against a purchaser for value without actual knowledge of the lien."

Unemployment Insurance Code section 1703.5:

"Within the time specified in Section 1703, the director may also file a certificate of state tax lien with the Secretary of State pursuant to Chapter 14.5 (commencing with Section 7220) of Division 7 of Title 1 of the Government Code. From the time of the filing of the certificate with the Secretary of State, the amount required to be paid, together with interest and penalty, constitutes a lien upon all personal property in the state owned by the person or afterwards acquired by him until the certificate of state tax lien lapses. The lien has the force, effect and priority of a judgment lien. A lien imposed by this section shall not be valid as against a purchaser for value without actual knowledge of the lien."

3. Bankruptcy Act section 67(c)(1)(B); 11 U.S.C. section 107(c)(1)(B) states:

"(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided,* That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision c of section 70 of this Act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accord-

ance with the requirements of such law: *And provided further, That if applicable lien law requires a lien valid against the trustee under section 70, subdivision c, to be perfected by the seizure of* property, it shall instead be perfected as permitted by this subdivision c of section 67 by filing notice thereof with the court; . . ." (Emphasis added.)

Statement of the Case

Respondent objected to a prior lien claim filed by the Franchise Tax Board of the State of California in the bankruptcy proceeding (In the Matter of Sylvin S. Perry, In Bankruptcy No. 9443-S (Central District of California)). The bankruptcy court was invested with jurisdiction to adjudicate this claim pursuant to the Bankruptcy Act, section 2; 11 U.S.C.A. section 11. The bankruptcy court sustained the objection to the claim, holding that the lien of the Franchise Tax Board did not apply to personal property despite the fact that the lien attached to "all property."[1] A Petition for Writ of Review was filed pursuant to Bankruptcy Act section 39(c); 11 U.S.C.A. section 67(c), which was denied without opinion.

An appeal was filed to the Ninth Circuit Court of Appeals. Jurisdiction was conferred by Bankruptcy

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[1]*Cf.* the IRS lien, 26 U.S.C. § 6321.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Act section 24; 11 U.S.C. section 47 which makes an order denying a Petition for Writ of Review reviewable by the Court of Appeals. The Ninth Circuit held that the decision of the bankruptcy referee was erroneous, insofar as he had determined that the lien was not meant to attach to personal property. However, the Ninth Circuit, ignoring all applicable state law on the subject held that without seizure the lien was not perfected against personal property. Judge A. Zirpoli dissented from the decision of the Court. He was of the opinion that the filing of the lien was the crucial act, and that once filed, the lien was valid against a bona fide purchaser, and, therefore, the trustee.

The Franchise Tax Board, in a petition for rehearing, urged that even if the Court's decision was proper, the second *proviso* to Bankruptcy Act section 67(c)(1)(B); 11 U.S.C. section 107(c)(1)(B) preserved the lien against the trustee in bankruptcy because the Franchise Tax Board (within the meaning of the initial decision) could perfect its lien by executing upon (*i.e.*, seizing) the property. The Court of Appeals, when faced with this solution, stated that state law did not require seizure to perfect the lien, a complete about-face, given the context of its initial opinion. The Court also held that the other conditions of the proviso were not fulfilled, in that the lien was not valid against a judgment creditor at the time of bankruptcy (and thus not valid against the trustee (Bank. Act § 70(c); 11 U.S.C. § 110(c)) and that filing the secured claim was not the notice required by the Bankruptcy Act. Judge Zirpoli would have granted the rehearing.

Statement of the Facts

A personal income tax liability was incurred by bankrupt Perry for the year ending December 31, 1962, and it remained unpaid. A lien was filed by the California Franchise Tax Board to secure the liability on December 15, 1966. Thereafter on February 28, 1967, an involuntary petition instituted these bankruptcy proceedings, and respondent was appointed trustee. The Franchise Tax Board filed a timely priority lien claim in the proceedings to which respondent filed an objection, contending that the claim was not entitled to priority under the provisions of the Bankruptcy Act. The statute authorizing a lien in favor of the Franchise Tax Board (California Revenue and Taxation Code section 18882) provided that a lien, once filed, attached to "all property" of the taxpayer. The Franchise Tax Board sought priority under Bankruptcy Act section 67 (c)(3), but the referee held that the lien in question did not attach to personal property, despite the fact that, in accordance with the statutory language, the lier had been interpreted by the State of California to attach to all property, both real and personal, for a 35-year period. A petition for reconsideration urging deference to the state's longstanding administrative construction was denied and the court ordered that the claim of the Franchise Tax Board be allowed only as a general unsecured claim.

This matter went up on an agreed statement of the facts. Said statement appears in the Clerk's Transcript at pages 3-7.

REASONS FOR GRANTING THE WRIT

INTRODUCTORY STATEMENT

The Court of Appeals was requested to review a decision by a bankruptcy referee which held that a state tax lien did not apply to personal property. That section, California Revenue and Taxation Code section 18882 read:

> "From the time of the filing for recording the amount of the tax, interest, and penalty set forth constitutes a lien upon all property of the taxpayer in the county, owned by him or afterward and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and continues for 10 years from the date of the recording unless sooner released or otherwise discharged."

The bankruptcy referee focused upon language in the statute which gave the lien the "force, effect and priority" of a judgment lien. Since an ordinary judgment lien attached only to real property (California Code of Civil Procedure section 674) the referee held that the lien of section 18882 attached only to real property, despite the fact that said section stated that the lien attached to "all property." The Court of Appeals held that all property was sufficient to include personal property, thus holding that the referee had erred.

Yet the Court of Appeals felt compelled to further its inquiry to determine if the lien, insofar as it attached to personal property, was valid against a *bona fide purchaser.*[2] In doing so the Court of Appeals

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[2]It is clearly authorized to make this inquiry. Bank. Act. § 67(c)(1)(B); 11 U.S.C. § 107(c)(1)(B).

focused upon the same language which the referee did (*i.e.* "force, effect and priority of a judgment lien") and held that since a California judgment lien was not perfected against personal property unless there has been a seizure, the lien of the Franchise Tax Board was not perfected against a *bona fide purchaser.*[3] This is an anomalous result. A duly noticed tax lien precludes the existence of a bona fide purchaser, *United States v. Sirico,*. 247 F. Supp. 421, 422 (S.D.N.Y. 1965); *United States v. Goldberg,* 362 F.2d 575, 578 (3d Cir. 1966); 4 Collier on Bankruptcy, p. 312, § 67 (14th ed. 1969); *see also,* 26 U.S.C. § 6323, and upon recordation, the lien, valid against both real and personal property gives notice to the whole world. This is elementary hornbook axiom.

If this decision is allowed to stand, it will result in an unfortunate and unwarranted disruption of $100,000,000 of state tax liens and continued misinterpretation of state law by the federal courts. In this matter, a 35-year-old statute, which during its life had been treated by the agency charged with its enforcement as creating a lien on personal property, was declared inapplicable as it affected personal property without due consideration of its legislative history and administrative construction, and without giving due deference to interpretations of state law. In fact, in order to make its decision, the Court of Appeals ignored a state court decision which held that the filing of a state tax lien

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[3]But the court failed to note that while the judgment lien was valid only against real property, the lien created by California Revenue and Taxation Code sections 18881 and 18882 attaches expressly to both real and personal property. As noted in Judge Zirpoli's dissent, the distinction is significant. Execution is not necessary to obtain a lien against personal property, insofar as the state tax lien is concerned.

perfected the lien against personal property. *Wright v. Standard Engineering Corp.*, 28 Cal. App. 3d 244, 250, 104 Cal. Rptr. 539 (1972). It is a long-standing rule that federal courts are governed by state law when the nature of an interest in property is to be determined. *Aquilino v. United States*, 363 U.S. 509, 513 (1960). Moreover, in analyzing California Revenue and Taxation Code section 18882 and the related statutes, the Court of Appeals also completely disregarded the accepted state rules of statutory construction promulgated by the courts of California. The Court of Appeals, in a mere gloss at statutory construction, held that certain language appearing in Revenue and Taxation Code sections 6757, 6757.5, Unemployment Insurance Code sections 1703 and 1703.5 was mere surplusage. State law prohibits such a construction if a reasonable construction of the language can be adopted. *Union Oil Co. v. State Board of Equalization*, 60 Cal. 2d 441, 448, 34 Cal. Rptr. 872, 386 P.2d 496 (1963); *Edwards v. Sweigert*, 15 Cal. App. 503, 507, 115 Pac. 256 (1911); *Rumetsch v. City of Oakland*, 135 Cal. App. 267, 269, 26 P.2d 677 (1933).

In ruling as it did, the Court of Appeals has set aside a valid state tax lien meant to secure and preserve the revenues due to the State of California. The lien has always been treated by the state as perfected and enforceable against personal property. [Affidavit of J. T. Philbin, appearing at pp. 19-20 of the Clerk's Transcript.] The effect of this decision extends far beyond its bankruptcy application. The ruling declares that, absent seizure, any lien or other interest in personal property arising subsequent to the filing of the California tax lien is valid against a previously filed and noticed tax lien because notice of the latter is deemed

not to exist absent seizure. Such federal interference with established state law is unwarranted and unnecessary, in addition to being erroneous. This Court has ruled on many occasions that federal courts should tread lightly, if at all, on state tax collections. Recently, this Court stated:

> ". . . Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly:
>
> " 'The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.' 28 U.S.C. § 1341.
>
> "We have repeatedly barred anticipatory federal adjudication of the validity of state tax laws. Dows v. City of Chicago, 11 Wall. 108; Matthews v. Rodgers, 284 U.S. 521; Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293; see also Perez v. Ledesma, 401 U.S., at 126-127, n. 17 (opinion of Brennan, J.). The decisions cited by appellees may, therefore, be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases, and with long-standing judicial policy." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542-43 (1972).

The Ninth Circuit has not only interfered with state tax collections, but to the extent its holding is followed, it has abrogated effective enforcement of one hundred million dollars of state tax liens against personal property. The decision has another grave aspect, one which

contravenes the purpose of the bankruptcy act. If the tax collector must seize a tax debtor's property to perfect its lien, an anxious tax collector who is aware that a taxpayer is near insolvency will more freely execute on that property. The effect of that execution would probably drive the debtor into bankruptcy, whereas, absent the execution, that would not happen. Nor would the levy by the tax collector be voidable. Bank. Act § 67(b); 11 U.S.C. 107(b). Encouraging such action cannot be countenanced.

I

The Ninth Circuit Was Bound to Interpret a State Tax Law in Accordance With Both State Decisional Law and State Rules Governing the Interpretation of State Statutes. It Failed to Do So

Much confusion stems from the two opinions of the Court of Appeals. It is impossible to understand the result which the Court finally decreed, because it cannot be determined what conclusion the Court reached. First the Court held that the lien in question here was not valid against the trustee in bankruptcy because the lien was not perfected or enforceable against a bona fide purchaser at the date of bankruptcy. *See* Bank. Act § 67(c)(1)(B); 11 U.S.C. § 107(c)(1)(B). The Court reached this result by holding that the state tax lien could only be perfected against a bona fide purchaser through seizure. Then, in its subsequent decision the Court held that seizure did not perfect the lien, it merely enforced it. But if seizure merely enforced a duly noticed tax lien, then it

must follow that the lien was perfected and became choate at some prior time. Otherwise, no lien would exist at all. Yet the Court's opinion holds that the lien against personal property, in some form, does exist. This circuitous result prevents the State of California from understanding the final import of the Court of Appeals' decision, except to know that for some reason, its lien against personal property is not valid in bankruptcy.

The Court of Appeals, in its first sentence of the opinion noted that the question of whether the Franchise Tax Board lien was valid against a bona fide purchaser was one of first impression. In essence, this statement was correct. The particular narrow issue before the Court had not been decided previously. However, California case law did exist by which the question could be resolved.

Where there are no state decisions construing the statute in question, the federal court may make its own determination, but must consider all available data and information to arrive at a decision which it feels the state court would make. *Hanna v. Safeway Stores,* 223 F.2d 858, 862 (9th Cir. 1955). In making the inquiry, the Court must accept considered dicta as well as definitive expressions of local law by the courts of the state. *Yoder v. Nu Enamel Corporation,* 117 F.2d 488 (8th Cir. 1941). The Ninth Circuit's disregard of the rulings of the California state courts dealing with this subject matter is an error of the first magnitude.

A. The Case of Wright v. Standard Engineering Corp., 28 Cal. App. 3d 244, 104 Cal. Rptr. 537, Should Have Been Followed by the Court in Making Its Decision

The California Court of Appeal has given a strong indication that the lien of the Franchise Tax Board attaches to personal property without condition. The Court of Appeals failed to even consider the state court decision of *Wright v. Standard Engineering Corp., supra,* 28 Cal. App. 3d 244, 250, 104 Cal. Rptr. 537.

The matter before the Ninth Circuit Court of Appeals involved the validity of a state personal income tax lien against personal property once that lien had been filed. In *Wright,* the California Court of Appeal has expressly stated the effect of filing a similar certificate. "[W]hen [the state] recorded the Certificate of Delinquency it acquired a lien which entitled it to a priority also under section 6757 since plaintiff's judgment lien did not come into existence until a later date."[4] p. 250. While the *Wright* case dealt solely with California Revenue and Taxation Code section 6757, the language is equally appropriate to section 18882 because it was intended to accomplish the same result (*i.e.,* securing state tax revenues). (The two statutes do have one basic difference, discussed *infra,* which is relevant to the consideration of California Revenue and Taxation Code section 18882, but that difference

[4]The Ninth Circuit's statement, in denying rehearing (see Appendix B), that the state lien would not be valid against a subsequent judgment creditor is wholly erroneous in light of this explicit statement of California law.

does not affect the purpose of the lien.) The *Wright* decision demonstrates that recordation is a crucial event in perfecting a state lien against personal property.

The Court of Appeals' failure or refusal to apply the decision (it does not even refer to it in either opinion) was wholly improper. There was certainly no justification for the Ninth Circuit's holding in denying rehearing that the lien was not good against a subsequent judgment creditor, for *Wright* holds precisely that it was valid against a subsequent judgment creditor. The existence of the State court decision required the Ninth Circuit to both examine and apply its rationale. Its failure to do so justifies the issuance of the writ of certiorari.

B. The Court of Appeals Completely Disregarded Rules of Statutory Construction in Considering the Statutes in Question

In this matter, three statutes were, in effect, before the Court although it required adjudication of only one.

California Revenue and Taxation Code section 18882 provides:

> "From the time of the filing for recording the amount of the tax, interest, and penalty set forth constitutes a lien upon all property of the taxpayer in the county, owned by him or afterward and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and continues for 10 years from the date of the recording unless sooner released or otherwise discharged."

While section 6757 states:

"If any amount required to be paid to the state under this part is not paid when due, the board may within three years after the amount is due file for record in the office of any county recorder a certificate specifying the amount, interest, and penalty due, the name and address as it appears on the records of the board of the person liable for the same, and the fact that the board has complied with all provisions of this part in the determination of the amount required to be paid. From the time of the filing for record, the amount required to be paid together with interest and penalty constitutes a lien upon all property in the county owned by the person or afterward and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and shall continue for 10 years from the time of the filing of the certificate unless sooner released or otherwise discharged. The lien may, within 10 years from the date of the filing of the certificate or within 10 years from the date of the last extension of the lien in the manner herein provided, be extended by filing for record a new certificate in the office of the county recorder of any county and from the time of such filing the lien shall be extended to the property in such county for 10 years unless sooner released or otherwise discharged. *The lien imposed by this section shall not be valid insofar as personal property is concerned as against a purchaser for value without actual knowledge of the lien.*" (Emphasis added.)

and Unemployment Insurance Code section 1703 says:

"If an employing unit is delinquent in a payment of any contributions, penalties or interest provided for in this division, the director may, not later than three years after the payment became delinquent, or within 10 years after the last entry of a judgment under Section 1815, file for record in the office of any county recorder a certificate specifying the amount of contributions, interest and penalities due the cost of recording a release as specified in subdivision (b) of Section 6103.8 of the Government Code, the name and address as it appears on the records of the department of the employing unit liable for the same and the fact that the department has complied with all provisions of this division in the determination of the amount required to be paid. From the time of the filing for record, the amount required to be paid, together with interest, penalty, and the cost of recording the release, constitutes a lien upon all the property in the county owned by the person or acquired by him before the lien expires. The lien has the force, effect, and priority of a judgment lien and shall continue for 10 years from the time of the filing of the certificate unless sooner released or otherwise discharged. The lien may, within 10 years from the date of the filing of the certificate or within 10 years from the date of the last extension of the lien, be extended by filing for record a new certificate in the office of the county recorder of any county and from the time of such filing the lien shall be extended to all the property in such county for 10 years unless sooner released or other-

wise discharged. *A lien imposed by this section shall not be valid insofar as personal property is concerned as against a purchaser for value without actual knowledge of the lien.*" (Emphasis added.)

The emphasized portion of the latter two statutes does not appear in the first (and subject) statute. The latter two statutes invalidate the lien "against a purchaser for value without actual knowledge of the lien." The Court of Appeals ruled that the addition of this language by the Legislature was "unnecessary and redundant. They may well have been added out of an abundance of caution. . . ."[5] What this statement amounts to is a holding that the above quoted language is mere surplusage. The Court's cavalier dismissal of this language, with neither analysis nor reasoning, cannot be sustained in light of the tests which must be applied to the interpretation of a statute, especially with reference to the former statute which does not include the language which the Court of Appeals so cavalierly dismissed.

Statutes dealing with the same matter should be construed with reference to the whole system of law of which it is a part. *Gleason v. City of Santa Monica,* 207 Cal. App. 2d 458, 461, 24 Cal. Rptr. 656 (1962). There is no doubt that tax lien statutes are a part of one broad spectrum of the administration of tax collections by the state, and all tax lien statutes should be considered as a whole. In comparing California Revenue and Taxation Code section 6757 and California Unemployment Insurance Code section 1703 with California Revenue and Taxation Code section 18882 there

[5]The fact that the Ninth Circuit used the language ". . . they may well have been added . . ." is strong proof that the Court did not examine the statute in accordance with canons of statutory construction.

is a significant difference in the way the Legislature intended to treat the liens, for in the former sections it was provided that the lien against personal property was not valid against a purchaser for value without actual knowledge of the lien, while the Franchise Tax Board lien has no such provision. If, as the Court of Appeals found, the Legislature added the bona fide purchaser language to California Revenue and Taxation Code section 6757 and California Unemployment Insurance Code section 1703 out of an abundance of caution, and, if, as the Court of Appeals concluded, the Legislature did not intend the Franchise Tax Board lien to be valid against a bona fide purchaser, why did it not extend its caution to this statute? The obvious answer is that it did not intend the Franchise Tax Board lien to be treated the same as the Human Resources Development and State Board of Equalization liens.[6] *Pac. Gas & E. Co. v. Shasta Dam Etc. Dist.*, 135 Cal. App. 2d 463, 467-69, 287 P.2d 841 (1955).

The Court of Appeals was bound to construe these state statutes in accordance with the rules of construction as laid down by the state courts. To consider the language in Califoria Revenue and Taxation Code section 6757 and California Unemployment Insurance Code section 1703 as mere surplusage does not ac-

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[6]California Revenue and Taxation Code sections 18882 and 18882.5 were amended after the Legislature added the "purchaser for value" language to Revenue and Taxation Code sections 6757 and Unemployment Insurance Code section 1703, and the Legislature did not add the language to either Franchise Tax Board lien section. *See* argument, *infra.*

cord with the rule of construction elucidated in *Weber v. County of Santa Barbara,* 15 Cal. 2d 82, 86, 98 P.2d 492 (1940).

> ". . . It is a cardinal rule of statutory construction that in attempting to ascertain the legislative intention effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part or provision useless or deprived of meaning. . . ."

The Court of Appeals made no such attempt,[7] despite the fact that it was examining two differently worded lien statutes. And given two differently worded statutes dealing with the same subject matter, it must be presumed that the Legislature intended different results. ". . . 'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed.' . . ." *People v. Valentine,* 28 Cal. 2d 121, 142, 169 P.2d 1 (1946). Therefore, it was not only improper to construe the language dealing with "a purchaser for value without actual knowledge of the lien" in California Revenue and Taxation Code section 6757 and California Unemployment Insurance Code section 1703 as mere surplusage; the Court of Appeals was bound to determine that the Legislature of the State of California meant something different in California Revenue and Taxation Code section 18882 by the omission of the quoted language from that section.

In fact, the statement of the court that the language was unnecessary and redundant contravenes the ele-

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[7]In fact, it did not even refer to any rules of statutory construction, state or federal, in its opinion.

mentary principle that words in a California statute should never be considered as unnecessary or surplusage if a reasonable construction can be adopted which will give force to all words of the statute. *Select Base Materials, Inc. v. Board of Equalization,* 51 Cal. 2d 640, 645, 335 P.2d 672 (1959); *Union Oil Co. v. State Board of Equalization, supra,* 60 Cal. 2d 441, 448, 34 Cal. Rptr. 872, 386 P.2d 496; *Edwards v. Sweigert, supra,* 15 Cal. App. 503, 507, 115 Pac. 256; *Rumetsch v. City of Oakland, supra,* 135 Cal. App. 267, 269, 26 P.2d 667. The inclusion of the "purchaser for value" language in California Revenue and Taxation Code section 6757 and California Unemployment Insurance Code section 1703, and the omission of it from California Revenue and Taxation Code section 18882 merits an intelligent inquiry into the reasons why the statute read differently. Under California law it almost conclusively indicates that the Legislature intended the liens created by those statutes to be treated differently. It is not sufficient to dismiss the language without considering that it may have a purpose.

The Court of Appeals had other standards by which it should have judged the statute in question, standards equally applicable to federal as well as state interpretation.

The Franchise Tax Board has continually interpreted section 18882 to be perfected and enforceable against personal property. This is ascertained from an examination of Claim No. 53 filed by the Franchise Tax Board [Cl. Tr. p. 7], and the affidavit of James Philbin, counsel for the Franchise Tax Board. [Cl. Tr. pp. 19-20.] On the face of Claim No. 53, it is noted that the lien of the Franchise Tax Board applies to both real and personal property. The affidavit of James Philbin indi-

cates that he is tax counsel for the Franchise Tax Board and that to his knowledge the Franchise Tax Board has treated section 18882 to be perfected against personal property since the time of its enactment in 1935. This Court is respectfully requested to take judicial notice of this.

The construction placed upon a statute by an administrative agency charged with the enforcement of the statute will be upheld as valid if the agency's interpretation of the statute appears reasonable. Only if there is no rational basis whatsoever upon which the administrative construction can be predicated will the administrative construction be deemed invalid.

> "Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." *Coca-Cola Co. v. State Bd. of Equalization,* 25 Cal. 2d 918, 921, 156 P.2d 1 (1945). "[I]f there appears to be some reasonable basis for the classification, a court will not substitute its judgment for that of the administrative body. . . ." *Rible v. Hughes,* 24 Cal. 2d 437, 445, 150 P.2d 455 (1944).

Federal cases have applied the same standard. *See, McCaughn v. Hershey Chocolate Co.,* 283 U.S. 488 (1931); *Hunt Foods and Industries, Inc. v. F.T.C.,* 286 F.2d 803, 809 (9th Cir. 1961). And where the courts of a state have declared expressly that they are required to follow a settled administrative practice in

interpreting a state statute, the federal court should not disregard the practice. *Orme v. Lendahand Co.*, 128 F. 2d 756, 758 (D.C. Cir. 1942). The Court of Appeals did not consider the agency's construction of the statute nor did it even refer to this well settled rule. It ignored it entirely.

Another factor which the Court of Appeals should have considered is the rule that the Legislature, which is presumed to be aware of an agency's administrative construction of a statute, by reenacting that statute without changing that construction is presumed to have acquiesced in the agency's interpretation. *El Dorado Oil Works v. McColgan*, 34 Cal. 2d 731, 739, 215 P.2d 4 (1950); *Coca-Cola Co. v. State Board of Equalization, supra; Mission Pak Co. v. State Board of Equalization*, 23 Cal. App. 3d 120, 100 Cal. Rptr. 69 (1972); *see also, Hunt Foods and Industries, Inc. v. F.T.C., supra*, 286 F.2d 803, 809; *McCaughn v. Hershey Food Co., supra*, 283 U.S. 488. Since the statute has been interpreted by the Franchise Tax Board to be enforceable against bona fide purchasers of personal property, the legislative action should be significant. Revenue and Taxation Code section 18882 has existed since 1935. It was amended in 1939, 1940, 1941, 1943, 1945, 1957, and 1971. The Legislature enacted section 18882.5, which must be read in conjunction with section 18882 (even though the section was not operative as it affected this appeal). It was enacted in 1969, and amended in 1970. At no time did the Legislature amend the statute to invalidate the lien against bona fide purchasers of personal property. Indeed, the 1970 amendment to California Revenue and Taxation Code section 18882.5 invalidated the lien against "a beneficial interest under a mortgage or deed of trust . . .

as against a purchaser of such interest for value without actual knowledge of the lien." In making either amendments or new enactments to the Franchise Tax Board lien, the Legislature took no steps to change the Franchise Tax Board practice, with the specific exception noted in section 1882.5.[8] It has therefore acquiesced in the construction of the statute which deems the lien valid against a bona fide purchaser, *El Dorado Oil Works v. McColgan, supra,* 34 Cal. 2d 731, 739, 215 P.2d 4.

Another consideration which strongly supports petitioner's position and to which the Court of Appeals gave no heed turns on the fact that it has always been the interest of the California Legislature to harmonize the California Personal Income Tax Law with the Internal Revenue Code. The former is based substantially upon the latter. *Holmes v. McColgan,* 17 Cal. 2d 426, 430, 110 P.2d 428 (1941). The application and interpretation of the federal law is persuasive in interpretation of the state statutes. *Meanley v. McColgan,* 49 Cal. App. 2d 203, 209, 121 P.2d 45 (1942); *Meanley v. McColgan,* 49 Cal. App. 2d 313, 317, 121 P. 2d 772 (1942).

While the federal government obtains a lien after any failure or refusal to pay taxes (26 U.S.C. § 6321),

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[8]The Legislature did not add at the time of these amendments the "purchaser for value language" to California Revenue and Taxation Code sections 18882, and 18882.5, even though said language did appear in California Revenue and Taxation Code section 6757 and California Unemployment Insurance Code section 1703. The failure to do so completely disproves the Court of Appeals holding that the language was added to the latter two statutes out of an abundance of caution, for if the Legislature had intended the same result to apply to the Franchise Tax Board lien, it would have to add the same language.

said lien is only valid against a bond fide purchaser upon the proper filing of the lien. 26 U.S.C. § 6323(a). Once filed, the lien is valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor.

It follows that the Legislature intended section 18882 to operate in the same manner as 26 U.S.C. 6323, that once the lien has been filed, it has full effect against both real and personal property. This approach, too, was totally ignored by the Court of Appeals.

It was not even the intention of the Bankruptcy Act to invalidate duly noticed tax liens. Senator Ervin, in discussing the amendments to section 67(c)(1)(B) (the section here used to invalidate the Franchise Tax Board lien, *see infra*) stated:

> "Mr. President, this bill is very simple, and it should certainly be passed. It has two purposes *The first is to outlaw certain liens which are not disclosed by the record and cannot be ascertained by creditors.*
>
> ". . . .
>
> "The first part of this bill will outlaw these unrecorded and undiscoverable liens, and recognize that the liens which take priority under the law of bankruptcy *are the recorded liens which are open to the inspection of the public* who deal with the prospective bankrupt.
>
> ". . . .
>
> "I repeat, this bill should be passed. It would clarify the law in one field and would do away with any unreported and undiscovered liens. It would give an advantage under the bankruptcy law to those with recorded liens which are open to the inspection of the public." Congressional Record June 21, 1966, p. 13188.

The statute in question must be analyzed in light of all the above data which was available to the court, yet the Court of Appeals considered none of it in judging Revenue and Taxation Code section 18882. The writ must issue here to provide an adequate examination of a statute securing $100,000,000 of unpaid state tax revenues.

C. The Language Setting Forth the Effect of the Lien Against Personal Property Was Never Intended to Limit the Validity of the Lien Against Bona Fide Purchasers

Given the extensive history of the statute, the legislative action and the administrative construction, it should not strike this court as incredible that no case, until the present one, has invalidated the Franchise Tax Board lien on personal property against a bona fide purchaser. The statute has existed for over 35 years, and the application remained unchallenged. This should call into operation the statement of the Honorable Justice Cardoza while he sat on the Court of Appeals of New York. "Not lightly vacated is the verdict of quiescent years." *Coler v. Corn Exchange Bank,* 250 N.Y. 136, 164 N.E. 882, 884, 65 A.L.R. 879 (1928).

Yet the Court of Appeals freely disregarded the past history of the statute. It disregarded the legislative analysis, refused to apply principles of statutory construction and failed to consider a state appellate case touching the subject matter. It did so in an old manner.

The Court of Appeals' decision held that the filing of the certificate created a lien against personal property, but that the lien was not valid against bona fide purchasers absent perfection by execution. This creates

an impossible state of affairs. The purpose of filing a tax lien is to give notice of the existence of a lien. *United States v. Sirico,* 247 F. Supp. 421, 422 (S.D. N.Y. 1965); *see* 26 U.S.C. § 6323. A subsequent purchaser cannot defeat a noticed tax lien. *United States v. Goldberg,* 362 F.2d 575, 578 (3d Cir. 1966); 4 Collier on Bankruptcy, p. 312, § 67 (14th ed. 1969). Indeed a bona fide purchaser can exist only if he can take without notice, actual or constructive. *Cowden v. Kress,* 202 Cal. App. 2d 1, 7, 20 Cal. Rptr. 560 (1962); *Wheaton v. Nolan,* 3 Cal. App. 2d 401, 403, 39 P.2d 457 (1934); *South v. Wishard,* 146 Cal. App. 2d 276, 286, 303 P.2d 805 (1956). The filing of a lien valid against both personal and real property with the County Recorder's office gives notice of the existence of the lien. California Civil Code § 19. Once the lien has been filed under section 18882, a bona fide purchaser cannot exist as to that lien. The filing gives notice to the world.

The Court of Appeals should not have zeroed in on the language dealing with the "force, effect and priority of a judgment lien." The Legislature manifested its intent by other language. By failing to interpret in accordance with the principles enunciated above, the Court of Appeals arrived at the anomalous result that a duly noticed tax lien does not give notice. But even if it can be deemed proper to consider the "judgment lien" language, in nowise can the conclusion drawn by the Ninth Circuit be sustained.

As did the bankruptcy referee, the Court of Appeals noted that a judgment lien in California attached only to real property. The referee read "all property" in conjunction with "judgment lien" and concluded that since a judgment lien attached only to real property the

Franchise Tax Board lien attached only to real property. This was clearly wrong. Even the Court of Appeals realized this, and held that the referee's decision was error. It is apparent that the language referring to "judgment lien" was not intended by the California Legislature in a limiting sense.

However, despite its conclusion that California Revenue and Taxation Code section 18882 was not meant to be limited to real property, by its own focus on the "judgment lien" language, the Court of Appeals reached the same limiting conclusion. It did so by stating that a judgment lien does not attach to personal property (which it does not) and that a levy of execution is required to bind a judgment debtor's personal property. It then held that the tax lien was a judgment lien (for purposes of federal law, it is not, *United States v. Gilbert Associates,* 345 U.S. 361, 365 (1953)), and that the tax lien, though valid against personal property did not have the effect of binding personal property.

Under no circumstances does a California judgment lien attach to personal property. It cannot do so because the statute creating the judgment lien is specific that it applies only to real property. Cal. Code of Civ. Proc. § 694. Execution against personal property can be enforced, but no lien rights are created other than through execution. Since the legislature authorized creation of the Franchise Tax Board lien against personal property upon filing, it is clear that no execution was necessary for there to be a lien valid against personal property. The effect of the "judgment lien" language is that once the certificate is filed it becomes a lien operative against the property against which it is imposed (in this case real and personal). The question

of the effect of the lien is governed elsewhere. *See* Cal. Civ. Code § 2872 *et seq*. Generally the effect is governed by the rules of first in time, first in right. Cal. Civ. Code § 2897; *United States v. City of New Britain*, 347 U.S. 81, 86 (1954); *Rankin v. Scott*, 25 U.S. 175, 179 (1827). The effect to be given a judgment lien runs from its operative date—the date it is recorded. At that time it is perfected. When a judgment lien is filed it creates a lien on real property. It gives a date certain of its creation, and it may be enforced. When the Franchise Tax Board files its lien, it too may be enforced (*see* California Revenue and Taxation Code sections 18817, 18906), it has a date certain as to when it is operative, and it attaches by express statutory authoriztion to real and personal property.

In contrast to California Revenue and Taxation Code section 18882 it must appear that the Legislature intended a filing under section 18882.5[9] to create a lien in favor of the Franchise Tax Board on all personal property of the debtor within the State of California, which lien would be good against *bona fide* purchasers, except those expressly excepted by the provisions of the statute and that said lien would attach to personal property without actual seizure. By endowing the lien created by section 18882.5 with the "force, effect and priority of a judgment lien" the Legislature intended to equate the characteristics of the newly created lien with those of a judgment lien which arises under the provisions of section 674 of the California Code of Civil Procedure upon the recordation of an abstract of judgment.

The judgment lien attaches only to real property. It has no effect on personal property. The lien arising

[9]Not involved directly herein.

from California Revenue and Taxation Code section 18882.5 affects personal property only. It would therefore follow that the Legislature intended that the newly created lien would have the same characteristics as a judgment lien except as to the kind of purchasers it excepts.

Section 18882.5 of the California Revenue and Taxation Code was enacted in 1969 and became operative January 1, 1970. It was amended in the following year to include the last sentence of the section as it now exists, which sentence exempts from the effect of the lien purchasers for value of beneficial interests in mortgages and deeds of trust without actual knowledge of the Franchise Tax Board lien. If the Legislature had intended that other purchasers be exempted from the lien, it could have named them. It also seems that if the Legislature had intended that seizure be a prerequisite to validating the lien against certain purchasers, it would have so provided in section 18882.5 of the California Revenue and Taxation Code. It did not do so in enacting this section, despite the fact that both California Revenue and Taxation Code section 6757 and California Unemployment Insurance Code section 1703 contained such language, and despite the fact the language was included in California Revenue and Taxation Code section 6757.5 and Unemployment Insurance Code section 1703.5, which were enacted at the same time as California Revenue and Taxation Code section 18882.5.

If the Court of Appeals' initial conclusion (which seems to have been repudiated in denying the petition for rehearing) was right, that the tax lien against personal property can be perfected only by seizure, there would be no necessity to include personal property in

Revenue and Taxation Code section 18882 and section 18882.5. Seizure of personal property for the payment of tax obligations does not require the existence of a judgment, or even a lien. Under California Revenue and Taxation Code section 18817, a levy may be made upon funds for "any tax, interest or penalties due from the taxpayer. . . ." No lien is required by this section, only a final tax liability. *See* Cal. Rev. & Tax. Code §§ 18591, 18593, 18641 *et seq.; Randall v. Franchise Tax Board,* 453 F.2d 381 (9th Cir. 1971). California Revenue and Taxation Code section 18906 provides that a warrant may issue "for the collection of any tax, interest or penalty *and* for the enforcement of any lien." A lien need not exist for the Franchise Tax Board to be able to execute upon personal property. There was no need to authorize a lien valid against personal property if execution was the only method by which a lien against personal property could be perfected against third party purchasers. Clearly, under California law, execution creates a possessory lien in the levying officer. *Nordstrom v. Corona City Water Co.,* 155 Cal. 206, 213, 100 Pac. 242 (1909). *See also, In re San Fernando Valley Restaurants, Inc.,* 236 F. Supp. 777 (S.D. Cal. 1964). If only execution created a valid and enforceable lien against personal property, California Revenue and Taxation Code sections 18882 and 18882.5 would be unnecessary and superfluous. The Legislature cannot be presumed to have engaged in an idle act.

The Court of Appeals has ignored abundant California legislative history and the obvious import of the California recording laws. Relegating a lien valid against personal property to the status of an inchoate lien is directly violative of the California Legislature's

declared intent that the lien is meant to apply to personal property. The court's decision even fails to recognize the one basic premise of the law of recordation—that recording is meant to cut off the existence of subsequent bona fide purchasers.

The lien of the State of California Franchise Tax Board was filed in accordance with the section authorizing it. It was filed prior to bankruptcy. Notice of that lien existed as a matter of law, therefore no subsequent bona fide purchaser could possibly exist as to that lien. The Court of Appeals' decision is erroneous, and the issuance of the writ prayed for necessary.

II

The Ninth Circuit Expressly Held That the Lien of the Franchise Tax Board Had to Be Perfected by Seizure. Therefore, It Should Have Been Subject to Perfection in the Bankruptcy Proceedings Under the Provisions of Bankruptcy Act Section 67(c)(1)(B) When the Franchise Tax Board Filed Its Notice of Lien

Bankruptcy Act section 67(c)(1)(B); 11 U.S.C. section 107(c)(1)(B) provides for the invalidation of certain liens against a trustee in bankruptcy. If a statutory lien is not valid against a (hypothetical) bona fide purchaser arising at the date of bankruptcy, the lien will be deemed invalid against the trustee. The section contains an important proviso: "that if applicable lien law requires a lien valid against the trustee under section 110(c) of this title to be perfected by the seizure of property, it shall instead be perfected . . . by filing notice thereof with the court."

The first determination which this proviso authorizes is to see if the lien would be valid against a judgment

creditor, as Bankruptcy Act section 70(c); 11 U.S.C. 110(c) makes the trustee a judgment creditor. California law clearly gives the Franchise Tax Board lien priority over a subsequent judgment creditor. *Wright v. Standard Engineering Corp., supra,* 28 Cal. App. 3d 244, 250; 104 Cal. Rptr. 537. The California court stated that when a certificate such as that in California Revenue and Taxation Code section 18882 is recorded, the lien created thereby is entitled to a priority over a subsequent judgment creditor.

Given this unequivocal statement by the state court, the Court of Appeals, in its opinion denying a rehearing did an incredible thing—it stated the state lien was not valid against subsequent judgment creditors and cited a case from the Third Circuit dealing with a Pennsylvania tax lien. The Court's disregard of a crucial state court holding is indicative solely of the appellate court's unrelenting momentum on rehearing in the direction of denying the Franchise Tax Board's claim. The only authority dealing with the subject was a state court ruling declaring that the lien was valid against a subsequent judgment creditor. The Court of Appeals was bound by that decision.

The Court of Appeals in denying rehearing did not stop its consideration at this point, however. It went on to conclude that state law did not require seizure to perfect its lien. This holding was diametrically opposed to its earlier holding in this case. In its initial opinion, the Court of Appeals stated "the Franchise Tax Board could have *perfected* its lien by going further and issuing and levying a warrant for the collection of the tax. . . ." (Emphasis added.) Again, in that decision, the court directly implies the same thing. "[T]he levy of a

writ of execution is *required* to bind the debtor's personal property in a manner that is effective against bona fide purchasers." (Emphasis added.) The first decision meant only one thing, that the Franchise Tax Board lien had to be perfected by seizure to be valid against section 67(c)(1)(B) (11 U.S.C. 107(c) (B)) of the Bankruptcy Act. The opinion on rehearing therefore is an unexplainable act of judicial about-face. In the first opinion the court declared that the Franchise Tax Board lien is not perfected unless there has been a seizure, and then on rehearing, when confronted with the fact that the Franchise Tax Board's lien can be rehabilitated under the express provisions of the Bankruptcy Act, the Court ignored the earlier holding and stated seizure merely enforces the lien. By implication, a quite clear one, the lien has already been perfected. If it has been perfected, it is valid against the trustee.

The Court's two opinions result in a wholly conflicting state of affairs. If the Court of Appeals' initial opinion, that the Franchise Tax Board lien had to be perfected by seizure, is correct, the Franchise Tax Board can rehabilitate its lien by filing notice of its lien with the bankruptcy court for it is valid against a subsequent judgment creditor. *Wright v. Standard Engineering Corp., supra.* If, however, the statement it has issued on rehearing is correct, that seizure is merely an enforcement device, the lien has already been perfected. The final result of these holdings is confusion, and the State of California has no guidance by which it can work with its tax liens for purposes of bankruptcy. This is grossly unfair to the State of California and either the initial opinion is correct, and the lien is inchoate, but subject to perfection by seizure, or it

is incorrect and the lien has been perfected. If the lien has been perfected, there is no necessity to invalidate it, nor does the second proviso of Bankruptcy Act section 67(c)(1)(B); 11 U.S.C. section 107(c)(1)(B) need to be distinguished. The Court of Appeals cannot be permitted to rule in one way to invalidate the lien and in the same case rule completely to the contrary to defeat the lien. It is impossible to tell what the decision of the Court of Appeals means and these two conflicting opinions must be clarified.

Indeed, if the initial decision can be allowed to stand, the state has complied with section 67(c)(1)(B). The lien is valid against a subsequent judgment creditor (*Wright v. Standard Engineering Corp., supra*) and if seizure is required to perfect it, as the Court initially held, state law authorizes seizure to perfect the lien. (Cal. Rev. & Tax. Code §§ 18906, 18817.)

The Franchise Tax Board filed notice of its lien with the bankruptcy court. [Cl. Tr. p. 9.] It clearly reflects that the claim is a secured claim and that the lien attaches to real and personal property. It sets forth the code sections under which it asserted its claim. This notice is sufficient to constitute the notice set forth in the proviso to section 67(c)(1)(B) (11 U.S.C. 107(c)(1)(B)).

Having done specifically what the Bankruptcy Act permitted to be done, given the existence of the Court of Appeals' initial decision, the Court of Appeals was bound to permit perfection of the Franchise Tax Board

lien to validate it against the trustee, and allow the claim as a prior lien claim in bankruptcy, subject to section 67(c)(3) (11 U.S.C. 107(c)(3))[10] of the act.

Conclusion

The Court of Appeals totally ignored state law in construing a state statute which permitted of no other conclusion than the lien of the Franchise Tax Board was valid against the world as to both real and personal property on the date of filing. Under the Court of Appeals' ruling, notice of the Franchise Tax Board's lien can never exist as to personal property, absent execution. Under state law, recordation is the crucial act, and once a lien has been recorded, one attaching to both real and personal property, a bona fide purchaser cannot exist. The Court's conclusion will substantially impair enforcement of personal property tax liens against almost every class of creditor.

On rehearing, when invalidating the state tax lien against the trustee in bankruptcy, the Court of Appeals

---

[10]"(3) Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. If the amount realized from the sale exceeds the total of such debt after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and the amount of the tax lien, is to be paid to the holder of the tax lien."

concluded that the lien was not valid against a subsequent judgment creditor, despite an express declaration of a California state court that the state lien was valid against a subsequent judgment creditor. It compounded this with a statement that the lien did not require seizure to perfect it—despite the fact that it had held that seizure was the precise act necessary to perfect. The decision of the Court ignores controlling state law, California legislative history, and consistency; therefore a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit

United States Court of Appeals, for the Ninth Circuit.

In the Matter of Sylvin S. Perry, Bankrupt. Franchise Tax Board of the State of California, *Petitioner-Appellant,* vs. Curtis B. Danning, *Trustee-Appellee.* No. 71-1675.

[June 8, 1973].

Appeal from the United States District Court for the Central District of California.

Before: DUNIWAY and HUFSTEDLER, Circuit Judges, and ZIRPOLI,* District Judge.

DUNIWAY, Circuit Judge:

OPINION

This case presents a question of first impression—whether the California Franchise Tax Board's claim for unpaid California personal income taxes, recorded as provided in the California Code, is a perfected lien upon personal property of a bankrupt taxpayer, and entitled to priority under 11 U.S.C. § 107(c)(3), or is insufficiently perfected and thus not good against the trustee or creditors under 11 U.S.C. § 107(c)(1)(B). The referee and the district court held that the lien was not sufficiently perfected. We affirm.

The stipulated facts are as follows:

The bankrupt incurred a California personal income tax liability for 1962 which was never satisfied. On

*Honorable Alfonso J. Zirpoli, United States District Judge, Northern District of California, sitting by designation.

December 15, 1966, some two-and-one-half months before the petition in bankruptcy was filed, the Franchise Tax Board (FTB) recorded a tax certificate with the Los Angeles County Recorder pursuant to Cal. Rev. & Tax Code §§ 18881, *et seq.* (West 1970). Section 18882 of that Code provides:

> "From the time of filing for recording the amount of tax, interest, and penalty set forth constitutes a lien upon all property of the taxpayer in the county, owned by him or afterward and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and continues for 10 years from the date of the recording unless sooner released or otherwise discharged."

We agree with the FTB that it did acquire a lien upon both the real property (if any—here there was none), and the personal property of the taxpayer. The phrase "all property" is broad enough to cover both types of property, and we see no reason to give it a narrower meaning.

That conclusion, however, does not solve our problem. The lien must be "perfected or enforceable at the date of the bankruptcy against one acquiring the rights of a *bona fide* purchaser on that date, whether or not such purchaser exists" (11 U.S.C. § 107(c)(1)(B)). The California statute provides that "[the] lien has the force, effect, and priority of a judgment lien" (§ 18882). In California, a recorded judgment creates a lien, good against *bona fide* purchasers, only

upon the debtor's real property; the levy of a writ of execution is required to bind the debtor's personal property in a manner that is effective against *bona fide* purchases. Cal. Code Civ. Proc. § 674 (West Supp. 1972); *Miller v. Bank of America,* 9 Cir., 1948, 166 F.2d 415, 417-19. Without such a levy, the lien of the judgment on personal property has no "force, effect [or] priority" against *bona fide* purchasers. Thus the California definition of the lien, and particularly of its "force, effect and priority," makes it clear that, so far as personal property is concerned, the lien is not "perfected or enforceable" at the date of bankruptcy as required by 11 U.S.C. §107(c)(1)(B). The FTB could have perfected its lien by going further and issuing and levying a warrant for the collection of the tax, which has the force and effect of a writ of execution. Cal. Rev. & Tax. Code § 18907 (West 1970). This the FTB did not do.

To counteract this seemingly obvious result, the FTB points to certain other California statutes, arguing that they show that, in enacting § 18882, the legislature intended to create a lien on the taxpayers personal property that is good against *bona fide* purchasers.

First, FTB points to Cal. Rev. & Tax. Code § 6757 (West 1970) relating to delinquent sales and use taxes. Before 1957, this section provided for the recording of a lien, which would attach to "all the real property" of the taxpayer. In that year the language was changed to read "all property," as does § 18882. Both sections retain the same definition of the "force, effect,

and priority" of the lien as that of a judgment lien. However, there was added at the end of the section:

> "The lien imposed by this section shall not be valid insofar as personal property is concerned as against a purchaser for value without actual knowledge of the lien."

Nothing comparable appears in § 18882.

Cal. Unemp. Ins. Code § 1703 (West 1972) has a similar history and similar language, including a proviso reading:

> "[E]xcept that with respect to personal property the lien shall not be valid against a purchaser for value without actual knowledge of the lien."

In 1969, the California legislature enacted the following provision as Cal. Unemp. Ins. Code § 1703.5 (West 1972), Cal. Rev. & Tax. Code § 6757.5 (West 1970), and *Id.* § 18882.5:

> "The board may also file a certificate of state tax lien with the Secretary of State. . . . From the time of filing of the certificate with the Secretary of State, the amount required to be paid, together with interest and penalty constitutes a lien upon all personal property in the state owned by the person or afterwards acquired by him until the certificate of state tax lien lapses. The lien has the force, effect and priority of a judgment lien."

Again, a proviso was added to the sales and use tax (§ 6757.5) and unemployment compensation tax (§ 1703.5) Code sections, but not to the one applicable to personal income tax (§ 18832.5):

> "A lien imposed by this section shall not be valid as against a purchaser for value without actual knowledge of the lien."

The FTB urges that we should conclude from this history, first, that "all property" was intended to and does mean both real and personal property, and second, that the exceptions in the sales and use tax and in the unemployment compensation tax sections indicate that the legislature believed that, without them, the liens would be good against *bona fide* purchasers of personal property, and that the absence of such an exception in §§ 18882 and 18882.5 indicates that the liens under those sections were meant to be, and are, good against *bona fide* purchasers of personal property.

The first argument, we can and do accept. The second, however, does not persuade us. Each of the statutes that the FTB cites defines the "force, effect, and priority" of the lien as that of a judgment lien. As we have seen, such a lien, until enforced by levy, is not good against *bona fide* purchasers of personal property. Thus the provisos in favor of such purchasers in the sales tax and unemployment compensation tax sections are perfectly consistent with the defined "force, effect, and priority" of the liens. The provisos are unnecessary and redundant. They may well have been added out of an abundance of caution; there is no legislative history to tell us why they are there. We cannot translate the absence of such provisos in §§ 18882 and 18882.5 into a determination by the legislature that the definition of the "force, effect, and priority" of the liens in those sections means something different from what it says.

Affirmed.

ZIRPOLI, District Judge (dissenting):

Appellant seeks review of an order of the District Court denying its Petition for Writ of Review from an adverse decision of a Referee in Bankruptcy. The parties have filed an agreed statement of facts, and they agree that the issues presented by this appeal are: (1) whether, pursuant to state law, California Revenue and Taxation Code § 18882 creates a tax lien on personal property for purposes of § 67c(3) of the Bankruptcy Act [11 U.S.C. § 107(c)(3)]; and (2) if § 18882 does create a lien on personal property, whether the lien is valid against one acquiring the rights of a bona fide purchaser, as required by § 67c(1)(B) of the Bankruptcy Act [11 U.S.C. § 107(c)(1)(B)]. Because the bankrupt had no real property, these issues greatly affect the status of appellant's tax claims. If, as the Referee and District Court concluded, § 18882 does not create a lien on personal property enforceable against a bona fide purchaser, appellant would be relegated to the status of a general creditor, because the tax debt involved became due more than three years preceding bankruptcy. *See* §§ 64a(4) [11 U.S.C. § 104(a)(4)]; 17a(1) [11 U.S.C. § 35(a)(1)]. But if a lien satisfying the requirements of § 67c(3) was created, appellant would be entitled to a priority, subject only the claims of § 64a(1) and (2) creditors [11 U.S.C. § 104(a)(1) and (2)].

I.

The statute that governs this dispute, Revenue and Taxation Code § 18882, at the time of the bankruptcy provided:

> From the time of the filing for recording [of a tax certificate described in § 18881 with any

> county recorder] the amount of the tax, interest, and penalty set forth constitutes a lien upon all property of the taxpayer in the county, owned by him or afterward and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and continues for 10 years from the date of the recording unless sooner released or otherwise discharged.

The finding of the Referee, which was summarily affirmed by the District Court, was that this statute does not create a lien on personal property. The reasoning, as explained to the parties in a letter opinion, was that the second sentence of § 18882, giving the lien "the force, effect and priority of a judgment lien," made the tax lien the same as a judgment lien. Pursuant to California Code of Civil Procedure § 674, a judgment lien attaches only to the real property of the debtor; the Referee therefore concluded that a § 18882 lien was similarly limited. The Referee also noted that in 1969—after the present bankruptcy was filed—the legislature enacted § 18882.5 of the Revenue and Taxation Code, which provides that the Franchise Tax Board may also file a certificate with the Secretary of State, and from the date of the filing the tax constitutes a lien on all personal property in the state owned or thereafter acquired by the debtor. The Referee argued that this provision was added to extend the tax lien to personal property, and was evidence that § 18882 did not create a lien on personal property.

Appellant argues that the Referee has misinterpreted the statute. In appellant's view, the scope of the lien is governed by the words "all property" in the first sentence of the statute, and thus a lien on personal as

well as real property is created. The second sentence was not intended to limit the breadth of the preceding sentence, but only to define the characteristics of the lien created.

There is, unfortunately, no state court decision interpreting the breadth of the lien created by § 18882. The only reported opinion that discusses the issue, *Schriber v. Alameda County—East Bay Title Ins. Co.*, 156 Cal. App. 2d 700, 707 (1958), expressly leaves the question unresolved. Thus, the court is faced with the uncomfortable task of interpreting an ambiguous state statute without guidance from the state courts.

There appears to be little doubt that were it not for the second sentence of § 18882, the statute would create a lien on personal property. Not only is this the most reasonable interpretation of the words "all property," but it is consistent with the California legislature's use of these words in other analogous statutes. In two situations where it is clear that the legislature intended to extend tax lien statutes formerly applicable to real property to include personal property, the change was affected by striking the word "real" and leaving the phrase "a lien upon all property" in one case and "a lien upon all the property" in the other. *See* Cal. Stats. 1957, Ch. 1188, at 2479, *amending* Cal. Stat. 1945, Ch. 566, § 2, at 1103 (codified at Cal. Unemp. Ins. Code § 1703); Cal. Stats. 1965, Ch. 863, § 2, at 2464, *amending* Cal. Stats. 1935, Ch. 57, § 14, at 1262 (codified at Cal. Rev. and Tax. Code § 6757). Interpreting "all property" to include personal property is also consistent with Revenue and Taxation Code § 103's definition of "property" as "all matters and things, real, personal, and mixed, capable of private ownership."

The issue is, then, whether the second sentence of § 18882 limits the scope of the lien suggested by the first sentence to real property, or whether it merely defines the characteristics of the lien. Similar tax lien provisions that expressly apply to personal property use words identical to those in the second sentence of § 18882 to describe the nature of the lien on personal property created. *See* Cal. Rev. and Tax. Code §§ 6757; 6757.5; 18882.5; Cal. Unemp. Ins. Code §§ 1703; 1703.5. It is, therefore, most reasonable to conclude that in § 18882, as in these analogous provisions, the words of the second sentence were not meant to prevent the statute from creating a lien on personal property.

It is not inconsistent with this view that in 1969 the legislature enacted Revenue and Taxation Code § 18882.5. As initially enacted, § 18882.5 provided:

> The board may also file a certificate of state tax lien with the Secretary of State pursuant to Chapter 14.5 (commencing with Section 7220) of Division 7 of Title 1 of the Government Code. From the time of the filing of the certificate with the Secretary of State, the amount required to be paid, together with interest and penalty constitutes a lien upon all personal property in the state owned by the person or afterwards acquired by him until the certificate of state tax lien lapses. The lien has the force, effect and priority of a judgment lien.

The legislature's intent in enacting this provision was probably not, as the Referee believed, to extend the tax lien of § 18882 to personal property. At the same time that it enacted § 18882.5, the legislature enacted pro-

visions nearly identical to it, which provide for filing certificates with the Secretary of State in connection with unemployment insurance compensation tax liens and sales and use tax liens. Cal. Unemp. Ins. Code § 1703.5; Cal. Rev. and Tax. Code § 6757.5. Yet, before these new sections were added, both unemployment insurance compensation tax liens and sales use tax liens clearly attached to personal property. *See* Cal. Unemp. Ins. Code § 1703; Cal. Rev. and Tax Code § 6757. Thus, it is most likely that, as appellant argues, the purpose of the new tax lien provisions was to provide, as an alternative to county-by-county filing, a central filing that would create a lien encompassing all personal property throughout the state. Thus, the enactment of § 18882.5 is not evidence that § 18882 does not create a lien on personal property.

II.

The second issue is whether a § 18882 tax lien on personal property is valid against one acquiring the rights of a bona fide purchaser, as required by § 67 c(1)(B) of the Bankruptcy Act. Although Judge Duniway agrees that the lower court cannot be affirmed for the reasons it relied upon, he nevertheless would uphold the judgment, because, in his view, § 18882 does not create a lien that satisfies § 67c(1)(B). I believe that this conclusion is based upon a failure to properly distinguish between a judgment lien and an execution lien, and therefore, I respectfully dissent.

The difficulty in deciding whether the lien created by § 18882 is valid as against a bona fide purchaser stems from the manner in which the legislature defined the lien. Rather than directly provide what priority would have, the legislature simply provided that it would have

the "force, effect and priority of a judgment lien." In California a "judgment lien" is that lien defined in California Code of Civil Procedure § 674, which provides in part:

> An abstract of the judgment or decree of any court of this State . . . may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor. . . .

As the language of § 674 expressly states, this lien encompasses only real property. *See Summerville v. Stockton Milling Co.*, 142 Cal. 529, 538 (1904); *Arnett v. Peterson*, 15 Cal. App. 3d 170, 173 (1971). This is true whether there is a levy of a writ of execution or not; no provision of California law ever permits that a judgment lien attach to personal property. If a writ of execution is properly levied, however, an *execution lien* will arise. Unlike a judgment lien, an execution lien can encompass "[a]ll goods, chattels, moneys or other property, both real and personal, or any other property." Cal. Code of Civ. Proc. § 688. While, like a judgment lien, an execution lien can issue only after the entry of a judgment, the two liens differ greatly. For example a judgment lien lasts for ten years, whereas an execution lien generally last for only one year. *Compare* Cal. Code of Civ. Proc. § 674 *with id.* § 688. California courts have always carefully distinguished the two liens, *see e.g., Lean v. Givens*, 146 Cal. 739, 741 (1905), as have commentators. *E.g., compare* 4 B. Witkin, California Procedure 3286 (2d ed. 1971) *with* 5 *Id.* 3447-48.

Only by erroneously considering an execution lien to be the same thing as a judgment lien is it possible to argue that § 18882 creates a lien that is perfected

as against a bona fide purchaser of personal property by levying a writ of execution: Section 18882 creates a lien with the same characteristics as a judgment lien, and a judgment lien is always perfected under California law by filing. It is a California execution lien that is perfected by levying a writ of execution.

If this distinction is not to be forgotten, § 18882 must be interpreted to mean that a tax lien is created which has the same "force, effect and priority" as compared to other's interests in a delinquent taxpayer's real and personal property that a judgment lien has as compared to other's interests in a judgment debtor's real property. Because a judgment lien is valid as against the rights of a bona fide purchaser, *see Page v. Rogers,* 31 Cal. 293, 312-13 (1866), a tax lien with the same characteristics is also valid as against the rights of a bona fide purchaser.

The California legislature seems to have shared this belief. In other tax lien statutes, where the legislature desired to protect bona fide purchasers of personal property from tax liens with the "force, effect and priority of a judgment lien," it has expressly provided an exemption. *See* Cal. Rev. and Tax. Code §§6757; 6757.5; Cal. Unemp. Ins. Code §§ 1701; 1701.5. The omission of this exemption in § 18882 is indicative of a legislative intent that this tax lien would be valid as against a bona fide purchaser.

I, therefore, conclude that the lien created by § 18882 attaches to a delinquent taxpayer's personal property and upon filing it becomes perfected as against one acquiring the rights of a bona fide purchaser. Thus, I would reverse the judgment of the court below.

APPENDIX B

Opinion of the United States Court of Appeals for the Ninth Circuit

United States Court of Appeals for the Ninth Circuit.

In the Matter of Sylvin S. Perry, Bankrupt. Franchise Tax Board of the State of California, *Petitioner-Appellant*, vs. Curtis B. Danning, *Trustee-Appellee*. No. 71-1675.

[November 2, 1973].

Appeal from the United States District Court for the Central District of California.

Before: DUNIWAY and HUFSTEDLER, Circuit Judges, and ZIRPOLI*, District Judge.

DUNIWAY, Circuit Judge:

OPINION

On Petition for Rehearing California contends that its claimed lien falls within the second proviso of §67 (c)(1)(B) (11 U.S.C. §107(c)(1)(B)). We conclude that it does not. It was not valid against judgment creditors at the date of bankruptcy. *In re Century Vault Co.*, 3 Cir., 1969, 416 F.2d 1035, 1038 n. 10. State law does not require seizure to "perfect" the lien; rather, seizure is to enforce the lien. *In re J. R. Nieves & Co.*, 1 Cir., 1971, 446 F.2d 188, 194. The proof of secured claim filed by the Board is not the equivalent of the notice contemplated by the proviso.

Rehearing denied. Judge Zirpoli would grant a rehearing.

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*The Honorable Alfonso J. Zirpoli, United States District Judge, Northern District of California, sitting by designation.

APPENDIX C.

United States District Court, Central District of California, 327 U.S. Court House, Temple & Spring Streets, Los Angeles, Calif. 90012, October 2, 1970.

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Thomas C. Lynch, Attorney General
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Re: SYLVIN S. PERRY
No. 9,443

Gentlemen:

I have reviewed the Points and Authorities filed in the above-entitled matter and believe that the Trustee's position is well taken. Section 18882 of the California Revenue and Taxation Code provides that the lien created by the recording of a certificate "has the force, effect and priority of a judgment lien." A judgment lien, as defined by Section 674 of the California Code of Civil Procedure, becomes a lien only "upon all the real property of the judgment debtor." As the bankrupt had no real property, but personal property only, the State of California had no lien which could be enforced and the state is a general creditor herein.

It is interesting to note that in 1969 the State Legislature recognized this loophole in the law and added Section 18882.5 to the Revenue and Taxation Code, which section specifically provides a procedure to create a lien upon the personal property of a taxpayer. As

this section was added after bankruptcy, the state could not, of course, have perfected the lien under this section.

Counsel for the Trustee will prepare, serve and lodge appropriate Findings of Fact, Conclusions of Law and Order.

Very truly yours,

/s/ Ray H. Kinnison
RAY H. KINNISON
Referee in Bankruptcy

RHK:idp

IN THE

Supreme Court of the United States

FEB 26 1974
OAK, JR., CLERK

October Term, 1973
No. 73-1182

In the Matter of

SYLVIN S. PERRY,

Bankrupt.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CURTIS B. DANNING,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1182

In the Matter of

SYLVIN S. PERRY,

Bankrupt.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CURTIS B. DANNING,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A of Petition)[1] is reported at 487 F.2d 84. The opinion of the Court of Appeals on denial of rehearing (Appendix B of Petition) is reported at 487 F.2d 89. No opinion was issued by the United States District Court, Central District of California, in affirming the unreported decision of the Referee in Bankruptcy (Appendix C of Petition).

[1]The reference to "Petition" in this brief refers to the Petition for Writ of Certiorari.

Objection to Jurisdiction.

Because the Petition was filed one day later than the ninety days allowed by 28 U.S.C. §2101(c),[2] this Court lacks jurisdiction in this case. *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

Rehearing was denied and judgment entered on November 2, 1973 by the Ninth Circuit Court of Appeals. The Petition was filed on February 1, 1974, the ninety-first day after the entry of judgment. The period of applying for a writ of certiorari has not been extended by a Justice of this Court.

Petitioner's application for a writ of certiorari, therefore, "must . . . be denied for want of jurisdiction." *Department of Banking v. Pink, supra.*

Questions Presented.

Whether this case, involving a minor state tax collection statute and presenting no issues of wide concern, is inappropriate for the issuance of a writ of certiorari.

Whether the Ninth Circuit Court of Appeals was correct in holding that Petitioner's lien was not perfected as against a *bona fide* purchaser under state law at the date of bankruptcy.

Whether the Ninth Circuit Court of Appeals was correct in holding that Petitioner's lien did not meet

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[2] 28 U.S.C. §2101(c) provides as follows:

> (c) Any . . . writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice to the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

the requisi[te tests to qualify for substituted perfection by the filin[g of notice.

Statutes Involved.

In addit[ion to the statutes quoted in full in the Petition at 5-[10, the provisions of Cal. Code Civ. Proc. §674 and [Bankruptcy Act §70c, 11 U.S.C. §110(c) are directl[y relevant to the issues herein. Each of those statutes is [expressly referred to in a clause in a statute of major in[portance in this case.

Cal. Re[v. & Tax. Code §18882, quoted in full in the Petitio[n at 5 and herein, *infra* at footnote 8, p. 13, gives Petit[ioner's tax lien "the force effect, and priority of a ju[dgment lien. . . ." The California judgment lien statut[e is Cal. Code Civ. Proc. §674 (West Supp. 1973):

> §674. *Abstract of judgment; recording; lien of judgment; scope, duration.*
>
> An abstract of the judgment or decree of any court of this State, including a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk, judge or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such record upon being the judgment or decree becomes a lien not exempt from execution, in such county, owned by him at the time, or which he may afterward and before the lien expires, acquire. Such lien continues for 10 years from the date of the entry of the judgment or decree unless the enforcement of the judgment or decree is stayed on appeal by

the execution of a sufficient undertaking or the deposit in court of the requisite amount of money as provided in this code, or by the statutes of the United States, in which case the lien of the judgment or decree, and any lien or liability now existing or hereafter created by virtue of an attachment that has been issued and levied in the action, unless otherwise by statutes of the United States provided, ceases, or upon an undertaking on release of attachment, or unless the judgment or decree is previously satisfied, or the lien otherwise discharged. The abstract above mentioned shall contain the following: title of the court and cause and number of the action; date of entry of the judgment or decree; names of the judgment debtor and of the judgment creditor; amount of the judgment or decree, and where entered in judgment book, minutes or docket in the justice court. (As amended Stats. 1955, c. 781, p. 1380, § 1; Stats. 1957, c. 43, p. 603, § 6.)

Similarly, the second proviso of Bankruptcy Act §67 (c)(1)(B), 11 U.S.C. §107(c)(1)(B), quoted in full in the Petition at 10 and herein *infra* at footnote 9, p. 13, refers to liens "valid against the trustee under section 70, subdivision c." Bankruptcy Act §70(c), 11 U.S.C. §110 (c), provides in full:

(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy

the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction.

Statement of the Case.

Respondent objected to Petitioner's priority lien claim on the basis that it was not perfected against the trustee under Bankruptcy Act §67 (c)(1)(B), 11 U.S.C. §107(c)(1)(B), because California law gives Petitioner's lien the "force, effect, and priority of a judgment lien," and judgment liens in California attach only to real property. The Honorable Ray H.

Kinnison, Referee in Bankruptcy, agreed with Respondent's construction of California law and placed Petitioner in the general creditor category.

After the District Court refused to review the case, the Ninth Circuit Court of Appeals affirmed the Referee's decision, although on different grounds. It held that Petitioner had to execute upon its personal property lien under California law in order to perfect the lien against the trustee in his status of a *bona fide* purchaser. In its opinion denying rehearing, the Ninth Circuit rejected Petitioner's argument, raised for the first time in its petition for rehearing, that its lien had been perfected by the filing of notice. The Ninth Circuit held that Petitioner had not met any of the three required tests for this substituted method of perfection.

On the ninety-first day after rehearing was denied, Petitioner filed its Petition for Writ of Certiorari with this court.

ARGUMENT.

I.

Because It Involves the Construction of a Minor State Tax Collection Statute and Presents No Federal Issues nor Issues of National Concern, This Case Is Not Appropriate for the Issuance of a Writ of Certiorari.

A. Introduction.

In 1923, Chief Justice Taft wrote:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given . . . to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing." *Magnum Import Co. v. De Spoturno Coty*, 262 U.S. 159, 163 (1923).

The instant case presents no issues of general public interest or importance. The principal question concerns construction of a California tax collection statute in conjunction with the California judgment lien statute. On this issue of first impression, the decision by the Ninth Circuit Court of Appeals, by a panel all of whom are members of the California bar, painstakingly and correctly construed the statutes.

That decision has very little significance beyond the instant case in California. Petitioner can continue to secure its claims by execution and related methods, or it can seek a relatively simple legislative amendment to the tax collection statute at issue here. Even Petitioner does not argue that this case has any signifi-

cance outside of California, since an asserted misapplication of state law is Petitioner's sole ground for requesting certiorari. Petition at 2.

B. The Decision of the Ninth Circuit Court of Appeals Is of No Importance Outside of California and Will Have Only a Minimal Impact Inside the State.

In an address before the American Bar Association in 1949, Chief Justice Vinson said: "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." 69 S.Ct. V, VI (1949). At another point he suggested that one criterion for granting certiorari should be whether the case involves "widespread uncertainty regarding problems of national importance." *Id.* at X.

Although the instant case is one in bankruptcy, there are no significant bankruptcy issues raised.[3] Rather, the issues are ones of state law in the technical field of tax liens, a field in which statutes may vary widely from state to state. Moreover, it is the relationship between a particular tax lien statute, Cal. Rev. & Tax. Code §18882, and the judgment lien statute, Cal. Code Civ. Proc. §674, which is at issue here, and it seems most unlikely that such a narrow issue would

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[3]There is one very peripheral bankruptcy issue with regard to the construction of the "notice thereof" language in the second provision of Bankruptcy Act §67(c)(1)(B), 11 U.S.C. §107 (c)(1)(B), but Petitioner had to, and did not, demonstrate that its lien met two other tests concerning state law before this issue could be reached. See discussion of the §67(c)(1)(B) proviso, *infra*, at pp. 18-19.

have any close analogies elsewhere. Indeed, one indication of the nonimportance of this issue is the fact that no similar cases could be found on the subject, in California or any other state.

Even in California, the Ninth Circuit's resolution of this issue will have little impact beyond the present case. The other four California tax lien statutes,[4] which are somewhat analogous to Rev. & Tax. Code §18882, all implicitly require seizure of personal property to perfect the lien as against a bona fide purchaser of personal property subject to the lien. Thus the Ninth Circuit's holding will not in any way affect these other statutes and has the additional, beneficial effect of harmonizing Cal. Rev. & Tax. Code §18882 with them. That result is in compliance with the California rule of statutory construction that inconsistent provisions on the same subject will not be presumed. See *In re Haines,* 195 Cal. 605, 613, 234 Pac. 883, 886 (1925); *Proctor v. San Francisco Port Authority,* 266 Cal.App.2d 675, 682, 72 Cal.Rptr. 248, 253 (1968).

In the limited area of tax collections with which Cal. Rev. & Tax. Code §18882 is concerned, Petitioner retains many options after the Ninth Circuit's decision for enforcing its current and future liens. There is no substance to Petitioner's attempt to make this case seem important by implying that Petitioner will lose most of its $100,000,000 in outstanding liens against

[4]Rev. & Tax. Code §§6757, 6757.5, Unemp. Ins. Code §§1703, 1703.5 quoted in full in Petition at 6-9.

personal property. See Petition at 4, 14, 31. As the Ninth Circuit pointed out, *In re Perry, supra,* 487 F.2d at 84, Petitioner can perfect any lien by merely "issuing and levying a warrant for the collection of the tax. . . ."[5]

Even if one assumes *arguendo* that the Ninth Circuit's holding was an incorrect construction of California law, Petitioner retains the option of relitigating this issue in another case in the California courts and obtaining a different result. The California courts are not bound by decisions of the lower federal courts, *Western Oil & Refining Co. v. Venago Oil Corp.,* 218 Cal. 733, 741, 24 P.2d 971, 974 (1933), nor of the United States Supreme Court, *Elliott v. Superior Court,* 168 Cal. 727, 733, 145 Pac. 101, 104, with regard to questions of state law. Finally, of course, Petitioner can urge the California legislature to amend Cal. Rev. & Tax. Code §18882 to explicitly comply with Petitioner's twisted construction of the present statute.

C. On the Questions of State Law at Issue Here, Which Have Not Been Addressed by the Highest State Court nor Any Intermediate State Court, the United States Supreme Court Should Defer to the Considered Judgment of the More Locally-Oriented Ninth Circuit Court of Appeals.

The Supreme Court's policy with regard to state law issues decided by the courts of appeals was clearly articulated in *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944): "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered de-

[5]Contrary to Petitioner's unsupported assertion, Petition at 17, we believe that execution upon personal property is no more likely than the recordation of a tax lien to drive a debtor into bankruptcy.

termination of questions of state law by the intermediate federal appellate courts. . . ." This policy was more recently affirmed in *Pierson v. Ray*, 386 U.S. 547, 558 n. 12 (1967). See also *Magenan v. Aetna Freight Lines*, 360 U.S. 273, 281 (1959) (Frankfurter, J., dissenting). It is a policy based upon the sound premise that circuit judges are likely to be more knowledgeable concerning the laws of the states in their respective circuits than justices of the Supreme Court can be with regard to any state's laws. See *Propper v. Clark*, 337 U.S. 472, 486 (1949).

In this context it becomes particularly relevant that the three federal judges who decided this case[6] are all members of the California bar. The significance of this fact was recognized by this Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956):

> "Since the federal judge making these findings is from the [state] bar, we give special weight to his statement of what the [state] law is." See also *Helvering v. Stuart*, 317 U.S. 154, 163 (1942) (circuit judge had "long experience in the jurisprudence of [the] state").

The decision of this qualified panel is particularly entitled to deference because the complex and narrow state issue here is one of first impression. There have been no decisions of the California Supreme Court nor of any California court of appeals which consider the particular issue presented in this case,[7] nor have there

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[6]Duniway and Hufstedler, Circuit Judges, and Zirpoli, District Judge, sitting by designation.

[7]Petitioner agrees that "[t]he particular narrow issue before the Court had not been decided previously", Petition at 18, but

been any cases construing the statute at issue in any manner that would give guidance in the instant case. In this situation, the decision of this court in *MacGregor v. State Mut. Life Assur. Co.*, 315 U.S. 280, 281 (1942) seems pertinent:

> No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan.

It should be pointed out in conclusion that Respondent believes that the Ninth Circuit's decision was unquestionably the correct construction of California law, as discussed *infra* at p. 13. Even assuming *arguendo* that reasonable arguments could be made on both sides of the question, however, this Court has in such situations in the past deferred to the state law expertise of the Court of Appeals and left its holding undisturbed. See, *e.g.*, *Estate of Spiegel v. Comm'r*, 335 U.S. 701, 708 (1949).

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then suggests that the case of *Wright v. Standard Engineering Corp.*, 28 Cal.App.3d 244, 104 Cal.Rptr. 539 (1972), should have been "followed" by the Court of Appeals. Yet Petitioner recognizes that that case involved a different statute and was concerned with collection of a different tax. Petition at 19. Moreover, what Petitioner asserts to be a holding, Petition at 20, appears to be mere dictum on an unlitigated issue. See discussion of the *Wright* case, *infra*, at pp. 16-17.

II.

The Ninth Circuit Court of Appeals Was Clearly Correct in Its Construction of a Complex State Collection Statute.

A. The Ninth Circuit's Construction Is in Accord With the Plain Language of the Statute and With State Tax Lien Policy.

Cal. Rev. & Tax. Code §18882 allows the Franchise Tax Board to obtain a lien with "the force, effect, and priority of a judgment lien."[8] The statute says nothing, however, about when the lien is perfected against *bona fide* purchasers; the resolution of this issue was crucial to a determination of the validity of Petitioner's statutory lien against the bankruptcy trustee, Respondent herein, under §67(c)(1)(B) of the Bankruptcy Act, 11 U.S.C. §107(c)(1)(B).[9] Since there

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[8]Cal. Rev. & Tax. Code §18882 provides in full:

"*Tax certificate; lien; force, effect, and priority.* From the time of the filing for recording the amount of the tax, interest, and penalty set forth constitutes a lien upon all property of the taxpayer in the county, owned by him or afterward and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and continues for 10 years from the date of the recording unless sooner released or otherwise discharged."

[9]Bankruptcy Act §67(c)(1)(B), 11 U.S.C. §107(c)(1)(B) provides in full:

"(c)(1) The following liens shall be invalid against the trustee:

"(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided*, That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision (c) of section 110 of this title and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *And*

were no reported cases on the subject, the Court of Appeals turned to the judgment lien statute, Cal. Code Civ. Proc. §674.[10]

The judgment lien statute only explicitly addresses liens upon real property, but the Ninth Circuit held that the term "all property" in Cal. Rev. & Tax. Code §18882 covered both real and personal property. *In re Perry*, 487 F.2d 84, 85 (9th Cir. 1973). It then examined the issue of perfection with regard to judgment liens and, based upon a careful consideration of relevant California law, held:

> In California, a recorded judgment creates a lien, good against *bona fide* purchasers, only upon the debtor's real property; the levy of a writ of execution is required to bind the debtor's personal property in a manner that is effective against *bona fide* purchases [*sic*]. Cal. Code Civ. Proc. §674 (West Supp. 1972); *Miller v. Bank of America*, 9 Cir., 1948, 166 F.2d 415, 417-419. Without such a levy, the lien of the judgment on personal property has no "force, effect [or] priority" against *bona fide* purchasers. Thus the California definition of the lien, and particularly of its "force, effect and priority," make it clear that, as far as personal property is concerned, the lien is not "perfected or enforceable" at the date of bankruptcy as required by 11 U.S.C. §107(c)(1)(B).

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provided further, That if applicable lien law requires a lien valid against the trustee under section 110(c) of this title to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision by filing notice thereof with the court;"

[10]Cal. Code Civ. Proc. §674 is quoted in full at pp. 3-4, *supra*.

In addition to being the correct construction of California law, the Ninth Circuit's decision is in accord with state tax lien policy. The three principal state tax lien collection statutes are now harmonized, so that any tax lien on personal property will only be valid against a *bona fide* purchaser with actual knowledge of the lien. Moreover, this result complies with common sense. Petitioner has conceded that "filing of [a judgment] lien does not give any notice to third persons as to the encumbrancing of the debtor's personal property. Execution is necessary. . . ." Petition for Rehearing to the Ninth Circuit at 4.

B. The Ninth Circuit's Construction Is in Accord With All Applicable State Precedents and Rules of Construction.

As pointed out earlier, the Ninth Circuit was faced here with a question of first impression, upon which there were no reported state decisions. In this situation, the panel sought the best available expression of California law on the subject of judgment liens and their perfection:

> "The general rule is that goods and chattels of a judgment debtor are subject to liens predicated upon an execution but are not subject to liens predicated upon the rendition or entry of judgment.
>
> . . .
>
> California follows the general rule that goods and chattels of a judgment debtor are subject to liens based upon an execution and not upon the rendition or entry of judgment." *Miller v. Bank of American N.T. & S.A.*, 166 F.2d 415, 418 (9th Cir. 1948).

Petitioner never suggests that *Miller* is in any way inaccurate in its statement of California law; indeed, Petitioner never even mentioned *Miller* in its Petition. Instead, Petitioner asserts that the case of *Wright v. Standard Engineering Corp.*, 28 Cal.App.3d 244, 104 Cal.Rptr. 539, should have been "followed" by the Ninth Circuit, despite the fact that *Wright* is concerned with a different statute and a different tax. Petition at 19-20. Petitioner never explains how its quotation from *Wright*, which tersely grants the State Board of Equalization priority for its statutory lien as against a judgment lien creditor, has any relevance to the issue of perfection as between a statutory lienholder and a *bona fide purchaser*.

Other aspects of the *Wright* case make Petitioner's reliance on it even more puzzling. At one point the *Wright* court states, in another context but in agreement with the Ninth Circuit's holding in the instant case, that an attachment lien on personal property is "not created merely by the issuance of a writ but rather by the levy by an officer on specific property." 28 Cal. App.3d at 249, 104 Cal.Rptr. at 542-543. Moreover, the State Board of Equalization in *Wright* did what the Ninth Circuit suggested Petitioner could have done in this case to perfect its lien: it levied a warrant for the collection of the tax. *Id.*, 28 Cal.App.3d at 246, 104 Cal.Rptr. at 540.

It is thus very unclear whether there was anything in *Wright* for the Ninth Circuit to "follow", at least in the direction that Petitioner suggests. There was absolutely no analysis or discussion in the *Wright* opinion of the central issue here: whether a tax lien on personal property is perfected by recordation or by execu-

tion. Even if *Wright* had said what Petitioner claims it said, then, under these circumstances, with a different statute, the Ninth Circuit would not have been bound by this California intermediate appellate court decision. *Cf. Comm'r v. Estate of Bosch,* 387 U.S. 456, 465 (1967).

In addition to fully following all relevant state precedent, the Ninth Circuit clearly complied with accepted state rules of statutory construction. The Ninth Circuit was faced with the choice of either giving effect to the "judgment lien" language of Cal. Rev. & Tax. Code §18882 or ignoring that express language in favor of a distorted construction based on the absence of a sentence in §18882 which is present in two other statutes, the course Petitioner urges. In accordance with the California rule of statutory construction requiring that meaning be given to every word of a statute, *Weber v. County of Santa Barbara,* 15 Cal.2d 82, 86, 98 P.2d 492, 494 (1940), the Ninth Circuit held that the "judgment lien" language of §18882 had to be given its full effect.[11]

Petitioner claims that the Franchise Tax Board "has treated section 18882 to be perfected against personal property. . . ." Petition at 27. But the issue of perfection of a lien is not one within the realm of administrative construction. The Board makes no judg-

[11]Petitioner is apparently confused when it asserts, Petition at 24-26, that the Ninth Circuit misconstrued Cal. Rev. & Tax. Code §6757 and Cal. Unemp. Ins. Code §1703. The Ninth Circuit was not construing, because this case does not involve, those two statutes; rather, it was construing Cal. Rev. & Tax. Code §18882 and only examined the other two statutes as part of its search for helpful analogies. The comments of the Ninth Circuit with regard to the two statutes do not purport to be authoritative and will not in any way affect tax collections or liens under those statutes.

ments, hands down no decision, as to when *its own* liens are perfected. Instead, Petitioner records and/or executes upon its lien, and then it is up to a court to determine whether that lien is valid as against *bona fide* purchasers.

The Ninth Circuit implicitly rejected Petitioner's argument, Petition at 29-30, that the effect of the federal income tax lien is governing in determining the effect of a Franchise Tax Board ("FTB") lien. Since the California Legislature explicitly gave the FTB lien the effect of a *judgment lien,* not the effect of a federal tax lien, this argument seems strained on its face. Moreover, as Petitioner admits, Petition at 29-30, the federal lien and the FTB lien differ significantly in how they are obtained, making Petitioner's alleged analogy between the two liens dubious as a matter of legislative policy.

III.

The Ninth Circuit Court of Appeals Was Clearly Correct in Its Rejection, for Three Independent Reasons, of Petitioner's Claim to Substitute Perfection of the Lien.

A. Introduction.

Since Petitioner did not execute upon its lien and therefore cannot enforce it against the trustee in bankruptcy within the trustee's rights as a *bona fide* purchaser, Petitioner seeks instead to save its lien through the operation of the second proviso of Bankruptcy Act §67(c)(1)(B), 11 U.S.C. §107(c)(1)(B).[12] Under

[12]Bankruptcy Act §67(c)(1)(B), 11 U.S.C. §107(c)(1)(B), is quoted in full at p. 13, *supra.*

this proviso, a lien must meet *each* of three distinct tests:

(1) The lien must have been valid against a judgment lien creditor under Bankruptcy Act §70(c), 11 U.S.C. §110(c), at the date of bankruptcy.[13]

(2) State law must specifically require seizure of property in order to perfect the lien as against a *bona fide* purchaser.

(3) Notice of intention to perfect the lien via the §67(c)(1)(B) procedure must be filed with the bankruptcy court.

Petitioner did not demonstrate to the Ninth Circuit and has not demonstrated here that its lien meets any of these three tests.

B. Petitioner's Unexecuted Lien Would Not Have Been Perfected Against a Judgment Creditor at the Date of Bankruptcy.

Before a lien can be perfected after bankruptcy, it must on the date of bankruptcy already be valid as against the trustee under §70(c) of the Bankruptcy Act, 11 U.S.C. §110(c), which gives the trustee the rights of a judgment lien or executing creditor. See *In re Century Vault Co.*, 416 F.2d 1035, 1038. n. 10 (3d Cir. 1969); 4 Collier on Bankruptcy ¶67.26 at 360, 366 (14th ed. 1971). In support of its contention, Petitioner merely cites again to the apparent dictum with regard to another statute in the California intermediate appellate case of *Wright v. Standard Engineering Corp., supra.* See analysis of the *Wright* case, *supra* at pp. 16-17. The Ninth Circuit correctly rejected this argu-

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[13]Bankruptcy Act §70(c), 11 U.S.C. §110(c), is quoted in full at pp. 4-5, *supra.*

ment of Petitioner's, holding that the lien "was not valid against judgment creditors at the date of bankruptcy." 487 F.2d at 89.

With regard to California law, the Ninth Circuit has held that "[t]he trustee unquestionably enjoys the rights [under Bankruptcy Act §70(c)] of a creditor who has levied attachment or execution on the bankrupt's property." *Sampsell v. Straub*, 194 F.2d 228, 231 (9th Cir. 1951), *cert. denied*, 343 U.S. 927 (1952). Thus, on the date of bankruptcy, Petitioner *at best* held an unexecuted and unperfected tax (judgment) lien, while Respondent trustee obtained the rights of an executing or attaching judment lienor. It seems obvious that Respondent would have priority, and Petitioner's lien could not have been valid under §70(c).

C. State Law Allows the FTB Lien to Be Perfected by Methods Other Than Seizure.

Even assuming *arguendo* that the lien was valid against the trustee under §70(c), the Ninth Circuit correctly held that Petitioner's lien had not met the second test of the proviso, because "[s]tate law does not require seizure to perfect the lien." 487 F.2d at 89 (emphasis added). It based this holding upon the carefully reasoned decision of the First Circuit in *In re J. R. Nieves & Co.*, 446 F.2d 188, 193-194 (1st Cir. 1971).

Citing two scholarly law review articles, the First Circuit reasoned that state law allows almost any lien to be perfected by seizure and that this broad interpretation of the proviso to Bankruptcy Act §67(c)(1)(B) would make the invalidation purpose of that section "meaningless". It therefore follows that the proviso must be construed as allowing substituted, post-bank-

ruptcy perfection only with respect to those liens for which seizure is required in the sense of being the *only* way in which the lienor can perfect its lien.

Petitioner here had several alternative ways in which it could have perfected its lien. As the Ninth Circuit pointed out, 487 F.2d at 85, Petitioner could have issued a warrant for the collection of the tax, an alternative to direct seizure. *See* Cal. Rev. & Tax. Code §18906. Moreover, Petitioner's own citation to Cal. Rev. & Tax. Code §18817, Petition at 34, 40, indicates that Petitioner considers a notice to withhold money or property owed the tax debtor to be an alternative form of levying execution. Since seizure is thus not the *only* method available to Petitioner for perfecting its lien against *bona fide* purchasers, its lien does not meet the second test contained in the §67(c)(1)(B) proviso.

D. Petitioner's Filing of a Proof of Secured Claim Is Not the Filing Notice Required by the Bankruptcy Act.

As indicated above, Petitioner's lien did not meet either of the first two tests under the §67(c)(1)(B) proviso, and its failure to meet any *one* of these tests is enough to defeat its claim. Even if Petitioner's lien could (*arguendo*) meet the first two tests, however, Petitioner would still be required to demonstrate that it filed the appropriate notice with the bankruptcy court.

Petitioner's unsubstantiated assertion that the filing of its proof of claim was sufficient notice is both an incorrect application of the words of the statute and undesirable as a matter of policy. The statute requires filing of "notice thereof," and "thereof" can only be a reference to a notice asserting intention to perfect in accordance with the procedure in the §67(c)(1)(B) proviso. A notice of intention to perfect, which Peti-

tioner has never filed in the instant case, is the only document which would alert the trustee as to the nature of the claim being asserted and therefore as to the appropriate defenses to interpose.

Conclusion.

The primary issues of law in this case have now been carefully considered by three California-based tribunals: the bankruptcy court, the district court, and the Ninth Circuit Court of Appeals. All three tribunals decided in favor of Respondent upon the narrow questions of California law at issue here. The Ninth Circuit's resolution of these issues has no national or even statewide significance beyond the instant case, and, in any event, the Ninth Circuit correctly resolved all issues in accordance with applicable state law and state rules of statutory construction. Thus, by the relevant criteria of Supreme Court Rule 19(b), there is neither a "conflict with applicable state . . . law" nor "an important state . . . question." It is respectfully submitted that no useful purpose would be served by Supreme Court consideration of local issues carefully analyzed below. Even if that were not the case, the fact remains that the Court lacks jurisdiction to grant the Petition since it was filed beyond the period permitted by 28 U.S.C. §2101(c). For all of the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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